

WT 03-231

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Auction of Direct Broadcast Satellite Licenses)
) AUC-03-52
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ORDER

Adopted: November 17, 2004

Released: December 3, 2004

By the Commission:

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I. INTRODUCTION

1. By this Order, we conclude our consideration of the issues raised in the *Auction No. 52 Comment Public Notice* relating to eligibility for Direct Broadcast Satellite ("DBS") service licenses.¹ On January 15, 2004, we released an Order resolving the matter of eligibility for three of the four DBS

¹ *Public Notice*, Auction of Direct Broadcast Satellite Service Licenses Scheduled for August 6, 2003, Report No. AUC-03-52-A, 18 FCC Rcd 3478 (2003) ("*Auction No. 52 Comment Public Notice*"). On June 11, 2003, the Wireless Telecommunications Bureau ("WTB") issued a Public Notice announcing that Auction No. 52 would be delayed pending Commission resolution of the non-procedural issues it had raised in the *Auction No. 52 Comment Public Notice*. *Public Notice*, Auction of Direct Broadcast Satellite Service Licenses (Auction No. 52) Is Postponed, Report No. AUC-03-52-B, 18 FCC Rcd 11515 (2003). As explained below, Auction No. 52, which was held on July 14, 2004, did not include the license that is the subject of this Order. See *infra* paragraph 7.

licenses that were originally slated for Auction No. 52, that is, licenses authorizing operations at the western orbit locations of 175° W.L., 166° W.L., and 157° W.L.² Today we decide that eligibility for the fourth license, which authorizes use of the last two available channels at an eastern DBS orbit location—61.5° W.L.—should be restricted.³ Specifically, any licensee currently operating satellites at orbit locations capable of providing DBS service to the 50 U.S. states will be prohibited from acquiring, owning, or controlling this license for a period beginning with the release date of this Order and ending four years after the award of the initial license. We conclude that such a restriction on eligibility for this license will serve the public interest by helping to promote the development of an additional provider of DBS services.

II. BACKGROUND

2. The Commission first established DBS service rules in 1982 by adopting “interim” rules that were codified in Part 100 of its regulations.⁴ In 1995, the Commission adopted new service rules for the DBS service to better reflect the realities of the service as it had evolved and to promote certain goals, including the provision of DBS service to Alaska and Hawaii.⁵ On April 11, 2002, WTB, acting under delegated authority, streamlined the DBS competitive bidding rules by conforming them with the general competitive bidding rules set forth in Part 1 of the Commission's rules.⁶ On June 13, 2002, the Commission released the *Part 100 R&O*, in which it further streamlined the regulation of DBS and moved the DBS rules from Part 100 to Part 25.⁷

3. The authority to establish specific procedures for auctions has been delegated to WTB.⁸

² Auction of Direct Broadcast Satellite Licenses, *Order*, 19 FCC Rcd 820 (2004) (“*DBS Order*”).

³ The two available channels are 23 and 24.

⁴ See Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, *Report and Order*, 90 FCC2d 676 (1982), *recon. denied*, 53 RR2d 1637 (1983).

⁵ See Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd 9712 (1995) (“*DBS R&O*”). In the *DBS R&O*, the Commission also adopted competitive bidding rules for the DBS service. The Commission held the first DBS auctions in January 1996, auctioning construction permits for 28 channels at the 110° W.L. orbit location in Auction No. 8 and 24 channels at the 148° W.L. orbit location in Auction No. 9.

⁶ Amendment of Parts 1, 21, 22, 24, 25, 26, 27, 73, 74, 80, 90, 95, 100, and 101 of the Commission Rules - Competitive Bidding, *Order*, 17 FCC Rcd 6534 (WTB 2002) (modified by errata, 17 FCC Rcd 11146 (WTB 2002)).

⁷ Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, 17 FCC Rcd 11331 (2002) (“*Part 100 R&O*”).

⁸ See Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 448, ¶ 124 (1997). The Commission has directed WTB to seek comment on specific mechanisms related to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum accepted bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal (continued....)

Pursuant to this authority, WTB's standard practice, prior to every auction, is to issue a Public Notice seeking comment on the specific procedures to be used in the auction. After considering the comments received, WTB issues a Public Notice that announces the procedures that will be used. In the case of Auction No. 52, the full Commission issued a Public Notice (the *Auction No. 52 Comment Public Notice*) seeking comment on two issues that were more appropriate for a Commission-level (rather than Bureau-level) decision. In the interests of administrative efficiency, this Public Notice also sought comment on those auction procedures that the Bureau usually handles on delegated authority.

4. The first non-procedural issue raised in the *Auction No. 52 Comment Public Notice* concerned the auctionability of DBS licenses. Specifically, we explained our conclusion that the Commission has the authority to auction DBS licenses for channels at orbit locations assigned to the United States under the International Telecommunication Union ("ITU") Region 2 Band Plan,⁹ and that this authority has not been altered by regulatory and statutory actions taken since DBS auctions were last held.¹⁰

5. The second non-procedural issue involved eligibility for DBS licenses. Thus, we sought comment on various questions regarding possible eligibility restrictions for the licenses that were to be included in Auction No. 52. Noting that in several services the Commission has determined that a prophylactic eligibility restriction may be imposed only when there is significant likelihood of substantial harm to competition in specific markets and when the restriction will be effective in eliminating that harm,¹¹ we sought comment on the use of that standard for this service. Observing also that one of the four licenses scheduled for auction—the license at the 61.5° W.L. location—authorizes

(Continued from previous page)

and bid removal, stopping rules, and information relating to auction delay, suspension or cancellation. *Id.* at 448, ¶ 125. See also Amendment of Part 1 of the Commission's Rules — Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697, ¶ 16 (1997) (clarifying that pursuant to Section 0.131 of the Commission's rules, the Chief of the Bureau has delegated authority to implement all of the Commission's rules pertaining to auctions procedures).

⁹ Eight orbit positions were assigned to the United States for DBS, under the auspices of the ITU, at the 1983 Regional Administrative Radio Conference for the Planning in Region 2 of the Broadcasting-Satellite Service in the Frequency Band 12.2 – 12.7 GHz and Associated Feeder Links in the Frequency Band 17.3 – 17.8 GHz. Under this Region 2 Band Plan for Ku-band DBS satellites ("ITU Region 2 Band Plan"), which was agreed upon by the nations present, the orbit slots assigned to the United States are for coverage of the United States. More specifically, the ITU Region 2 Band Plan assigns to the United States all of the channels at the following orbit locations: 175° W.L., 166° W.L., 157° W.L., 148° W.L., 119° W.L., 110° W.L., 101° W.L., and 61.5° W.L. See Appendix 30 and Appendix 30A of the International Radio Regulations.

¹⁰ *Auction No. 52 Comment Public Notice*, 18 FCC Rcd at 3479-80.

¹¹ See, e.g., Allocations and Service Rules for the 71-76 GHz, 81-86 GHz and 92-95 GHz Bands, *Report and Order*, 18 FCC Rcd 23318, 23346-47, ¶¶ 69-70 (2003); Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates, and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, 9677-82, ¶¶ 159-70 (2002) ("*MVDDS Second Report and Order*"); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600, 18619-20, ¶¶ 32-35 (1997).

the use of only two channels, we sought comment on whether this fact warrants any modification of our existing open eligibility regime for the DBS service. More specifically, we requested comment on whether we should adopt the eligibility criteria for this particular license that Rainbow DBS had proposed in the application it filed on July 3, 2002, to modify its DBS authorization to add these two unassigned channels.¹² Thus, we requested comment on (1) whether the applicant should be an existing permittee at the 61.5° W.L. location; (2) whether the channels should be assigned to an applicant that holds no other DBS channel resources capable of serving the continental United States; and (3) whether the applicant should be required to demonstrate an ability to launch in the near future. We also asked whether the Commission should consider eligibility restrictions on particular orbit locations based on entities' market position in the provision of terrestrial multichannel video programming. Finally, we sought comment on any other proposed eligibility requirements for each of the orbit locations, including the rationale for any such requirements.¹³

6. In response to the *Auction No. 52 Comment Public Notice*, we received four comments and two reply comments as well as numerous ex parte filings.¹⁴ In our *DBS Order*, released on January 15, 2004, we affirmed our conclusion that the Commission has the authority to auction DBS licenses for channels at orbit locations assigned to the United States under the ITU Region 2 Band Plan.¹⁵ In addition, noting that no commenter had proposed any eligibility restrictions for the available licenses at the 175° W.L., 166° W.L., and 157° W.L. orbit locations, we declined to adopt any eligibility restrictions for those three licenses.¹⁶ In order to avoid delaying a decision on the three western licenses, we deferred the matter of eligibility for the 61.5° W.L. license, about which we had received detailed comments, to a separate order.¹⁷

7. Following the release of our *DBS Order*, WTB issued a Public Notice rescheduling Auction

¹² This application was filed under the name of the company at the time, R/L DBS Company, LLC. The company has since then changed its name to Rainbow DBS Company LLC; therefore, we refer to the company in this Order as "Rainbow DBS." Rainbow DBS's modification application was dismissed on other grounds. See Letter from Donald Abelson, Chief, International Bureau, and John B. Muleta, Chief, Wireless Telecommunications Bureau, to David Deitch, General Counsel and Senior Vice President, R/L DBS Company, LLC, dated March 3, 2003.

¹³ *Auction No. 52 Comment Public Notice*, 18 FCC Rcd at 3480-81.

¹⁴ Comments were filed on March 17, 2003, by Northpoint Technology, Ltd., and Broadwave USA, Inc., and on March 24, 2003, by Rainbow DBS, EchoStar Satellite Corporation ("EchoStar"), and PanAmSat Corporation ("PanAmSat"). Reply Comments were filed on March 31, 2003, by Rainbow DBS and EchoStar. Since filing its Comments and Reply Comments, EchoStar has converted from a corporation into a limited liability company and changed its name to EchoStar Satellite L.L.C. See Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite L.L.C., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated December 31, 2003). Ex parte filings are listed in the Appendix.

¹⁵ *DBS Order*, 19 FCC Rcd at 825-26, 832, ¶¶ 12, 21. Northpoint Technology, Ltd., and Compass Systems, Inc. have challenged the Commission's decision that these DBS licenses are not subject to the auction prohibition of Section 647 of the Open-Market Reorganization for the Betterment of International Telecommunications Act, 47 U.S.C. § 765f. *Northpoint Technology, Ltd. v. FCC*, No. 04-1052 (D.C. Cir. filed Feb. 17, 2004).

¹⁶ *DBS Order*, 19 FCC Rcd at 833, ¶ 24.

¹⁷ *Id.* at 834, ¶ 26.

No. 52, resolving all procedural issues relating to the auction, and adjusting the license inventory of the auction to include only the three licenses for which we had resolved the eligibility issue.¹⁸ Thus, Auction No. 52 was held on July 14, 2004, and included the licenses at the 175° W.L., 166° W.L., and 157° W.L. orbit locations. Rainbow DBS won two of the licenses (for 32 channels at 166° W.L. and 32 channels at 175° W.L.), and EchoStar won one of the licenses (for 29 channels at 157° W.L.).¹⁹ Pursuant to its delegated authority and consistent with this Order, WTB will schedule an auction of the 61.5° W.L. license.

III. DISCUSSION

A. Eligibility of DBS Incumbents

1. Comments

8. Rainbow DBS and EchoStar submitted comments on the issue of eligibility restrictions on the license for the two available channels at 61.5° W.L. Rainbow DBS, the licensee of 11 channels at the 61.5° W.L. orbit location, supports the adoption of the three eligibility criteria on which the Commission sought comment and which, as noted above, Rainbow DBS itself had proposed.²⁰ EchoStar, on the other hand, which is also the licensee of 11 channels at the 61.5° W.L. orbit location, opposes the adoption of eligibility restrictions for the license for the two available channels.²¹

9. Rainbow DBS contends that the Commission should prohibit EchoStar and DirecTV Enterprises, Inc. ("DirecTV") from eligibility for the two available channels at 61.5° W.L. because, given the market power they possess, these two operators have a strong incentive to acquire the two channels in order to foreclose rivals.²² Rainbow DBS further argues that the Commission should limit eligibility for these two channels to a facilities-based operator that is already licensed at the 61.5° W.L. orbit position in order to avoid the risk of the two channels being underutilized.²³ According to Rainbow DBS, the Commission has consistently determined that it is necessary to aggregate a number of channels at an orbit position in order to have a successful DBS business.²⁴ Rainbow DBS also argues that eligibility should be limited to applicants with "the demonstrated capability to launch a satellite that can use these frequencies in the immediate future,"²⁵ and that the Commission should consider stricter timelines for the due diligence milestones applicable to the two unassigned channels at 61.5° W.L. in

¹⁸ *Public Notice*, Auction of Direct Broadcast Satellite Service Licenses Rescheduled for July 14, 2004, Report No. AUC-04-52-D, 19 FCC Rcd 2018 (2004).

¹⁹ *Public Notice*, Direct Broadcast Satellite Service Licenses Auction Closes; Winning Bidders Announced, Report No. AUC-04-52-I, 19 FCC Rcd 13193 (2004) ("*Auction No. 52 Closing Public Notice*").

²⁰ *See generally* Rainbow DBS Comments and Reply Comments.

²¹ *See generally* EchoStar Comments and Reply Comments.

²² Rainbow DBS Comments at 5-6.

²³ *Id.* at 14-16.

²⁴ *Id.* at 14-15.

²⁵ *Id.* at 14, 16-17.

order to ensure speedier entry and delivery of services.²⁶ Finally, Rainbow DBS argues that any eligibility restrictions applicable to EchoStar with respect to the available frequencies at 61.5° W.L. must also be applied to Dominion Video Satellite, Inc. ("Dominion"), because EchoStar would be the real party in interest of any application for those frequencies filed by Dominion.²⁷ According to Rainbow DBS, the eligibility criteria it has proposed for the two unassigned channels at 61.5° W.L. will promote the public interest in video competition generally and among DBS operators specifically by facilitating the entry of a new, facilities-based DBS provider, which will speed innovation, increase consumer choice, and provide substantial consumer welfare.²⁸

10. According to EchoStar, eligibility restrictions on the 61.5° W.L. license are "unnecessary and probably unlawful."²⁹ EchoStar argues that the Commission should not place eligibility restrictions on the 61.5° W.L. license because satellite operators can effectively use small numbers of frequencies, particularly where, as here, the license provides an opportunity to serve a substantial potential market.³⁰ EchoStar also points out that the combination of restrictions that Rainbow DBS advocates would result in only one qualified applicant for the license, Rainbow DBS, and therefore an auction would take place in name only.³¹ EchoStar asserts that the Commission should, pursuant to Section 309(j)(3) of the Communications Act, ensure that the government receives a fair market price for the use of spectrum,³² and that, if it allowed Rainbow DBS to obtain the license for less than market value, the Commission would disserve the public by diminishing Rainbow DBS's economic interest in putting the license to its best use.³³

11. In response to Rainbow DBS's arguments, EchoStar contends that it lacks market power in any relevant market, and that in any case the increase in concentration caused by the acquisition of two channels would be negligible.³⁴ EchoStar further states that it currently uses its licensed channels at the 61.5° W.L. orbit location to carry local broadcast channels, high definition programming, foreign language programming, and pay-per-view ("PPV") and business television services, and contends that this use disproves Rainbow DBS's assertion that its interest in acquiring the two available channels at this location is motivated by a desire to foreclose competition rather than to provide enhanced services.³⁵

²⁶ *Id.* at 16-17.

²⁷ Rainbow DBS Reply Comments at 7-8. EchoStar indicates that Dominion is under a contractual obligation to allow EchoStar to use its frequencies. EchoStar Comments at 3.

²⁸ Rainbow DBS Comments at 2-3, 12-13.

²⁹ EchoStar Comments at 2.

³⁰ *Id.*

³¹ *Id.* at 2-3.

³² *Id.* at 4-5.

³³ *Id.* at 5.

³⁴ EchoStar Reply Comments at 1.

³⁵ *Id.* at 6-7.

12. At the time comments were filed, Rainbow DBS had constructed but not yet launched its Rainbow 1 satellite,³⁶ and EchoStar was using the two unassigned channels at the 61.5° W.L. orbit location under special temporary authority ("STA").³⁷ Thus, in its comments EchoStar noted that, despite the restrictions placed on its STA for these two channels by the Commission, it was utilizing the channels by providing service offerings such as sports and movie PPV events, high definition PPV programming, business television, and demonstration channels.³⁸ According to EchoStar, this also disproves Rainbow DBS's assertion that its interest in acquiring the two channels is motivated by a desire to foreclose competition rather than to provide enhanced services. EchoStar further stated that it would be futile for it to pursue an entry foreclosure strategy because Rainbow DBS had constructed a satellite and intended to begin offering service whether or not it received the license for the unassigned channels at 61.5° W.L.³⁹ EchoStar also stated that it needs additional spectrum to compete effectively in the multichannel video programming distribution ("MVPD") market.⁴⁰

13. Subsequent to the filing of comments, Rainbow DBS made an ex parte filing in which it argues that the Commission should impose eligibility restrictions on the 61.5° W.L. license that are in addition to those it previously proposed. In particular, Rainbow DBS recommends that the Commission adopt a 5 percent attribution limit, that ownership should be calculated on a fully diluted basis, and that certain management or other relationships (including spectrum lease arrangements, financing agreements, and joint venture agreements) create an attributable interest. Further, Rainbow DBS proposes that the Commission require applicants for the 61.5° W.L. license to certify their compliance with the eligibility rules at the time they submit their FCC Form 175 application for the auction, and that the Commission expressly decline to provide a post-auction opportunity to come into compliance with such rules.⁴¹

14. In ex parte filings submitted after the conclusion of Auction No. 52, EchoStar, in addition to reiterating certain of its earlier arguments, contends that the fact that Rainbow DBS and itself were the only qualified bidders in Auction No. 52, coupled with the fact that they are the only two licensees with

³⁶ Rainbow DBS successfully launched Rainbow 1 on July 17, 2003. See Letter from Benjamin J. Griffin, Counsel for Rainbow DBS, to Donald Abelson, Chief, International Bureau, Federal Communications Commission (dated July 24, 2003).

³⁷ Beginning in March 1998, EchoStar was granted an STA to operate on a number of unassigned channels on its satellite located at 61.5° W.L. EchoStar continued to use the two channels at issue in this Order up until October 2003, when the International Bureau ("IB") granted Rainbow DBS authorization to use those two channels under a new STA. See EchoStar Satellite Corporation, Application for Renewal of Special Temporary Authority to Operate a Direct Broadcast Satellite Over Channels 23 and 24 at the 61.5° W.L. Orbital Location, and Rainbow DBS Company L.L.C., Application for Special Temporary Authority to Operate a Direct Broadcast Satellite Over Channels 23 and 24 at the 61.5° W.L. Orbital Location, *Order and Authorization*, File No. SAT-STA-20030617-00117 and File No. SAT-STA-20030623-00122, 18 FCC Rcd 19825 (2003) ("*Rainbow DBS STA Order*"). The Commission restricted EchoStar's use of these channels to the type of programming that allowed EchoStar to cease operation in short order without disrupting subscribers' service.

³⁸ EchoStar Reply Comments at 6.

³⁹ *Id.* at 7.

⁴⁰ *Id.* at 6-7.

⁴¹ See Letter from Howard J. Symons, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated March 22, 2004) ("*Rainbow DBS March 22 Ex Parte*").

satellites at 61.5° W.L., indicates that it is highly probable that they will also be the only two entities interested in the two unassigned channels at that location. According to EchoStar, the Commission should not "entertain any speculation about hypothetical third parties that might be interested in these channels," and that a restriction making companies like EchoStar ineligible for the channels will result in Rainbow DBS winning them by default.⁴² EchoStar further argues that Cablevision Systems Corporation ("Cablevision") is not a start-up in any conventional sense,⁴³ that the assertion that it needs a "leg-up" is not defensible, and that an unfortunate and dangerous precedent would be set if the Commission were to create an eligibility restriction "based on unsubstantiated fears of anticompetitive conduct."⁴⁴

2. Decision and Analysis

15. In light of the unique circumstances of the license for the two channels at 61.5° W.L., we conclude for both public policy and statutory reasons that an eligibility restriction on DBS incumbents is appropriate for this particular license. More specifically, we conclude that it is appropriate to restrict the eligibility of entities currently operating satellites at orbit locations capable of providing DBS service to the 48 contiguous states plus Alaska and Hawaii, their wholly owned subsidiaries, and entities they control, to acquire, own, or control the license for these channels for a period beginning with the release date of this Order and ending four years after the award of the initial license. Thus, such entities are prohibited from acquiring the 61.5° W.L. license either through auction or in the post-auction market. Such entities are also prohibited from leasing the subject spectrum during the same time period.

16. The two channels at 61.5° W.L. are unique because they are the only remaining unassigned DBS channels in the 12 GHz band that are assigned to the United States under the ITU Region 2 Band Plan that can provide service to the eastern continental United States with a sufficiently high look angle that the signal is not blocked by terrestrial obstacles. In contrast, the recently auctioned DBS channels at 157° W.L., 166° W.L., and 175° W.L. are located so far west of the continental United States that they are unable to serve certain eastern parts of the country. Prior to Auction No. 52, there were 93 available channels at western orbit locations, but there remain only two unassigned channels at an eastern orbit location. Given these circumstances, the two channels at 61.5° W.L. could be quite important to increasing the number of options or choices available to subscribers of DBS or MVPD services.

17. Moreover, we believe that there are significant public policy reasons for us to take the steps described below to promote increased DBS choices. As we explain more fully below, increased choices in the DBS marketplace could yield important public interest benefits, including greater price competition, the development of additional new services, and technological innovation. Enhanced DBS competition has the potential to bring such benefits to consumers both in markets in which DBS operators compete with cable systems and in markets in which they do not.

18. In our Annual Report on the Status of Competition in the Market for the Delivery of Video

⁴² See Letter from Rhonda M. Bolton, Counsel for EchoStar Satellite L.L.C., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 22, 2004), at 1-2 ("*EchoStar October 22 Ex Parte*").

⁴³ Cablevision is the parent company of Rainbow DBS. See *infra* note 100.

⁴⁴ See *EchoStar October 22 Ex Parte*, at 2; Letter from Rhonda M. Bolton, Counsel for EchoStar Satellite L.L.C., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 19, 2004), at 1.

Programming, we have noted that, in addition to cable television systems, MVPDs include direct-to-home ("DTH") satellite service, which includes both DBS and home satellite dish ("HSD") service, as well as wireless cable systems and private cable operators.⁴⁵ In the MVPD market, however, the vast majority of subscribers are currently served by two technologies—cable TV and DBS. Thus, of households that subscribed to MVPD services in June 2003, 74.87 percent subscribed to cable TV, 21.63 percent subscribed to DBS, and only 3.57 percent subscribed to services provided using other technologies.⁴⁶

19. There are only two DBS operators currently serving all 50 states, DirecTV and EchoStar.⁴⁷ As of December 2003, DirecTV had approximately 12.15 million subscribers and EchoStar had approximately 9.44 million subscribers.⁴⁸ As of June 30, 2004, DirecTV reported 13.0 million subscribers,⁴⁹ and EchoStar reported 10.125 million subscribers.⁵⁰ DirecTV is authorized to operate on 46 full-CONUS DBS channels, and EchoStar is authorized to operate on 50 full-CONUS and 46 other DBS channels.⁵¹ In addition, as noted above, EchoStar won a license to operate on 29 DBS channels at 157° W.L. in Auction No. 52, which was held on July 14, 2004.⁵² The other companies currently

⁴⁵ HSD is a service requiring home receiving antennas larger than DBS antennas, i.e., antennas that can receive signals from low power C-band satellites. In December 2003, there were approximately 428,000 C-band DTH subscribers receiving video programming using large C-band satellite dishes or earth stations located throughout the country. These numbers were obtained on March 5, 2004, from http://www.skyreport.com/dth_counts.cfm. Usage of C-band dishes has been declining over time with the development of the newer high power DBS services by DirecTV and EchoStar that allow the use of smaller satellite dishes. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Tenth Annual Report*, 19 FCC Rcd 1606, 1610, 1613-14, 1655, ¶¶ 9, 16, 74 (2004) ("*Tenth Annual Report*").

⁴⁶ *Tenth Annual Report*, 19 FCC Rcd at 1718-19, Table B-1. According to the National Cable & Telecommunications Association, out of the total of 97 million MVPD customers in April 2004, 71.1 million or 73.30 percent subscribed to cable, 22.8 million or 23.51 percent subscribed to DBS, and 3.1 million or 3.19 percent subscribed to other MVPD services including C-band satellites, MMDS systems, SMATV systems, and alternative broadband providers. See Comments of The National Cable & Telecommunications Association in MM Docket No. 04-227, July 23, 2004, at 7.

⁴⁷ The question of whether DirecTV is fulfilling its obligations to serve Alaska and Hawaii is the subject of a pending proceeding. See *Public Notice*, Request for Comment on Petitions Regarding DIRECTV's DBS Service to the States of Alaska and Hawaii, DA 03-862 (MB, rel. March 25, 2003).

⁴⁸ These numbers were obtained on March 5, 2004, from http://www.skyreport.com/dth_counts.cfm.

⁴⁹ See DirecTV Group Inc. SEC Form 10-Q, filed on 6/30/04. http://ir.thomsonfn.com/InvestorRelations/SecFilings.aspx?partner=5276&type=results&cont_qualifier=C&doc_type=10-Q&doc_dcn=04964392&cont_format=RTF&doc_product=E&viewer=Y viewed on September 29, 2004.

⁵⁰ See EchoStar Communications Corporation SEC Form 10-Q, filed on 8/09/2004. <http://www.hoovers.com/free/co/secdoc.xhtml?ipage=2932518&doc=0&attach=on#tocpage> viewed on September 29, 2004.

⁵¹ By "full-CONUS" we mean channels capable of serving the 48 contiguous United States. See *infra* paragraph 21.

⁵² See *Auction No. 52 Closing Public Notice*, 19 FCC Rcd 13193.

providing DBS service are Dominion, which is authorized to operate on eight DBS channels but leases six of them to EchoStar and itself operates on only two,⁵³ and Rainbow DBS, which is authorized to operate on 11 DBS channels, has been granted an STA to use the two unassigned channels at 61.5° W.L.,⁵⁴ and won licenses to operate on 32 DBS channels at 166° W.L. and 32 DBS channels at 175° W.L. in Auction No. 52.⁵⁵ Rainbow DBS introduced its "VOOM" service in October 2003.⁵⁶ In a recent report, Cablevision, the parent company of Rainbow DBS, reported that as of June 30, 2004, Rainbow DBS had approximately 25,000 activated VOOM customers.⁵⁷

20. Given that the majority of MVPD subscribers obtain their service from either cable TV or DBS systems, we believe that the development of an additional DBS provider could benefit consumers. We have previously observed that while cable systems may compete with DBS companies in providing MVPD services in many local markets, in rural areas unserved by cable systems and areas served by low channel capacity analog cable systems, cable systems may not provide close substitutes for DBS service, as far as consumers are concerned.⁵⁸ In looking at the appropriate geographic markets in which to evaluate the competitive conditions relevant to the proposed EchoStar-DirecTV merger, we found it reasonable to classify geographic markets into three broad categories: (1) markets not served by any cable system; (2) markets served by a low-capacity cable system; and (3) markets served by high-capacity cable systems.⁵⁹ We also noted that the MVPD product market that includes DBS services

⁵³ Dominion operates the Sky Angel Network and indicates that it provides service "directly into homes, churches and other locations across the Continental United States...." See <http://www.skyangel.com/About/Index.asp?IdS=001DFA-AF11750&x=002|000&~=>> viewed on August 13, 2003. See also <http://www.skyangel.com/About/Faq.asp?IdS=00463B-ECA0D90&x=002|003&~=#11> viewed on April 2, 2004.

⁵⁴ On October 1, 2003, IB authorized Rainbow DBS to operate on the two channels at 61.5° W.L. under STA. The STA includes a number of conditions on Rainbow DBS, including that the channels may only be used for free-standing separate programming packages, that the use of the channels be capable of being withdrawn on short notice, and that Rainbow DBS notify its customers that the channels and the programming that they provide are only available on a short-term basis. *Rainbow DBS STA Order*, 18 FCC Rcd at 19828, ¶ 9.

⁵⁵ See *Auction No. 52 Closing Public Notice*, 19 FCC Rcd 13193.

⁵⁶ Initially, VOOM began operations providing 21 high definition video channels and 28 standard definition channels. See "Cablevision's Rainbow DBS Introduces "VOOM," Nation's First Television Service Designed to Meet Demand of Growing, Underserved HDTV Market," News Release, October 15, 2003, http://www.voom.com/util/press/press_101503.jsp. As of the end of September 2004, VOOM listed 38 high definition channels, 87 standard definition video channels, and 18 music channels. See *VOOM Channel Lineup*, http://www.voom.com/use_it/channel_lineup.jsp > viewed on September 29, 2004.

⁵⁷ "Cablevision Systems Corporation Reports Second Quarter 2004 Results," News Release, August 9, 2004. http://www.corporate-ir.net/ireve/ir_site.zhtml?ticker=CVC&script=410&layout=6&item_id=601760 > visited September 29, 2004.

⁵⁸ See Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee), *Hearing Designation Order*, 17 FCC Rcd 20559, 20607, 20610-11, ¶¶ 109, 120-121 (2002) ("EchoStar-DirecTV Hearing Designation Order").

⁵⁹ *Id.* at 20607-08, 20610-11, ¶¶ 110, 120.

involves differentiated products, and that two DBS providers (DirecTV and EchoStar) appear to be closer substitutes for each other than for services of cable systems or other MVPDs.⁶⁰ We stated that “the evidence in the record strongly indicates that the services offered by the applicants [EchoStar and DirecTV] are closer substitutes to each other than are cable services offered by either high-capacity or low-capacity cable systems.”⁶¹ Thus, increased DBS competition is likely to be particularly important in the first two market categories where cable systems either do not operate at all or do not provide close substitutes to DBS service.⁶²

21. Opportunities for the development of an additional DBS competitor are limited, however. Under the current 12 GHz DBS band plan, there are only three U.S. orbit locations (119° W.L., 110° W.L., and 101° W.L.) that the Commission considers to be full-CONUS. In other words, these are the only three DBS orbit locations for which satellite earth station antennas or satellite “dishes” used by consumers in all locations in the continental United States can easily point at the satellites with a look angle well above the horizon, so that hills and trees are unlikely to block reception.⁶³ These three locations are also capable of serving Alaska and Hawaii. There are, in addition, five other orbit locations assigned to the United States for operation in the 12 GHz DBS band.⁶⁴ However, there are no channels available at any of the orbit locations that can serve all 48 contiguous states plus Alaska and Hawaii.⁶⁵ Moreover, the two channels at 61.5° W.L. at issue here are, as explained above, the only two unassigned DBS channels in the 12 GHz band that can provide service with a sufficiently high look angle to eastern portions of the continental United States.

22. Because the 61.5° channels are the last two available that can serve all of the eastern United States plus most of the rest of the country, they may be important to enhancing the likelihood of an additional DBS provider being able to offer robust program offerings to consumers. Prior to Auction

⁶⁰ *Id.* at 20607-08, ¶ 110.

⁶¹ *Id.* at 20608, ¶ 113.

⁶² See *id.* at 20607-09, ¶¶ 109-112. We also note that, in its report of October 2003, the General Accounting Office (“GAO”) recognized the importance of DBS competition with cable TV in terms of reduced prices and improved service quality. More specifically, GAO found that DBS competition is associated with a slight reduction in cable rates and, where both DBS operators provide local-into-local service, cable operators offer approximately 5 percent more cable networks than cable operators where this is not the case. GAO stated that “[i]n terms of rates we found that a 10 percent higher DBS penetration rate in a franchised area is associated with a slight rate reduction—about 15 cents per month.” U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO 04-8 (Oct. 2003), at 11. Thus, increased DBS competition appears to have an impact in the third market category identified above as well.

⁶³ The 61.5° W.L. orbit location is visible from all of CONUS (Alaska and Hawaii are not visible). However, the look angle, the upward tilt of the DBS earth station antenna at which it must be pointed to receive the signal from the satellite, for example in Washington State, is sufficiently low that it may often be blocked by terrestrial obstacles (trees, buildings, etc.).

⁶⁴ Those five locations include 61.5° W.L., which is the subject of this Order, plus 148° W.L., 157° W.L., 166° W.L., and 175° W.L. All the channels at 148° W.L. are currently licensed to EchoStar. Three channels at 157° W.L. are licensed to EchoStar, which also won a license for the remaining 29 channels at that orbit location in Auction No. 52, which, as noted above, was held on July 14, 2004. Rainbow DBS won licenses for all of the channels at 166° W.L., and 175° W.L. in Auction 52. See *supra* paragraph 7.

⁶⁵ All of the channels at these orbit locations are currently licensed either to EchoStar or DirecTV.

No. 52, there were 93 available channels at western orbit locations, but there are only these two remaining channels at an eastern orbit location. Thus, although we did not find it appropriate to adopt eligibility restrictions for the licenses for the 93 channels at the 175° W.L., 166° W.L., and 157° W.L. orbit locations, we believe that we are presented here with a unique opportunity to promote enhanced DBS competition through special eligibility rules.

23. Our principal goal here is to enhance the possibility that an additional DBS provider can develop because we believe that a marketplace with additional competitors would likely result in such public benefits as greater price competition, additional new services, and increased technological innovation.⁶⁶ Moreover, even if an additional DBS licensee used the 61.5° channels not to become a major competitor but instead to provide programming and other services significantly different from the services provided by existing DBS providers serving all 50 states, the provision of such additional choices to consumers should nevertheless have substantial benefits to those customers, especially in those rural or suburban locations unserved by cable systems or served only by low channel capacity cable systems.

24. Thus, whether an additional DBS competitor provides a choice of similar programs at a lower price or provides a different group of program options, or other kinds of DBS, broadband and other types of services, consumers will benefit from those increased options. We note, for example, that although Rainbow DBS is currently authorized to operate on only 11 channels plus the two channels for which it has an STA, it has attempted to differentiate its VOOM DBS service from other competitors by advertising that it has more HDTV channels than any other DBS provider.⁶⁷ We recognize that DirecTV recently announced that it expects to expand its programming capacity with new next-generation (Ka-band) satellites. According to DirecTV, the first two of these satellites will be launched in 2005 and will have the capacity to provide more than 500 local high definition channels.⁶⁸ Thus, it appears that not only Rainbow DBS but also other DBS competitors intend to emphasize their delivery of high definition channels in the future, and it is unclear how long Rainbow DBS will be able to assert that it provides more high definition DBS channels than any other DBS provider. Nevertheless, we conclude that it is in the public interest to provide an additional DBS provider with an opportunity to

⁶⁶ We note that in our *First Space Station Licensing Reform Order*, in which we adopted a modified processing round approach to satellite licensing, we adopted a presumption with respect to non-geostationary satellite orbit ("NGSO")-like systems that three licensees are necessary to maintain a competitive market. We based this presumption on the rationale articulated in the *EchoStar-DirecTV Hearing Designation Order*, in which we observed that in general courts have condemned mergers that would result in duopoly, particularly in cases where additional market entry would be difficult. Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 10760, 10788, ¶ 64, n. 149 (2003) ("*First Space Station Licensing Reform Order*"), citing *EchoStar-DirecTV Hearing Designation Order*, 17 FCC Rcd at 20604-05 ¶¶ 99-103, citing, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001); *FTC v. Staples*, 970 F. Supp. 1066, 1081 (D.D.C. 1997).

⁶⁷ See "VOOM's Leadership Position in HD Content Widens with the Addition of HBO and Cinemax," Press Release, February 26, 2004, <http://www.voom.com/util/press/press_022604.jsp>. As noted above, as of the end of September 2004, VOOM listed 38 high definition channels, 87 standard definition video channels, and 18 music channels. See VOOM Channel Lineup. <http://www.voom.com/use_it/channel_lineup.jsp> viewed on September 29, 2004.

⁶⁸ See "DIRECTV Announces Plan to Launch Next Generation Satellites to Provide Dramatic Expansion of High-Definition and Advanced Programming Services," News Release, September 8, 2004. <http://www.directv.com/DTVAPP/aboutus/headline.dsp?id=09_08_2004A> viewed on September 28, 2004.

increase competition with the two major DBS providers currently serving the 50 states.

25. We also note that, as indicated above, currently DirecTV is authorized to operate on 46 full-CONUS DBS channels, and EchoStar is authorized to operate on 50 full-CONUS and 46 other DBS channels. EchoStar also won a license in Auction No. 52 to operate on 29 additional DBS channels.⁶⁹ Given the large number of channels they already are authorized to use and are currently using, we believe that an eligibility restriction that prevents DirecTV and EchoStar from using the two channels at 61.5° W.L. will impose relatively little harm on them.⁷⁰ In contrast, at present Dominion is authorized to operate on eight DBS channels but actually leases six of the eight to EchoStar and uses only two channels itself, and Rainbow DBS is authorized to operate on 11 DBS channels and has an STA for two additional channels. The two 61.5° W.L. channels might be very useful to the operations of such an existing DBS licensee with a limited number of channels, and might be even more useful to another potential applicant not yet operating any DBS system. We recognize that in Auction No. 52 Rainbow DBS recently won licenses to operate on an additional 64 DBS channels.⁷¹ We note in this regard, however, that none of the channels won by Rainbow DBS in Auction No. 52 are full-CONUS channels, and it will be a number of years before these channels can be put into use.⁷²

⁶⁹ See *Auction No. 52 Closing Public Notice*, 19 FCC Rcd 13193.

⁷⁰ We recognize the fact that EchoStar has indicated that it might use the channels to provide more local into local service, and that both EchoStar and DirecTV have suggested that providing local into local service is a Commission goal. We also recognize that we have, in fact, acknowledged the importance of local broadcast television and that "an increase in the amount of DBS-provided local-into-local service ... [could] increase competition in MVPD markets and should benefit consumers through increased choice, lower prices, or both." General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control, *Memorandum Opinion and Order*, 19 FCC Rcd 473, 616, ¶ 333 (2004). However, in this situation, with only two DBS channels at issue, we believe the benefits of encouraging another DBS competitor outweigh the benefits represented by the possibility that one of the two large DBS incumbents might use those channels to provide more local-into-local service.

⁷¹ See *Auction No. 52 Closing Public Notice*, 19 FCC Rcd 13193. We also acknowledge that Rainbow DBS has been authorized to launch and operate five Ka-band satellites and has in addition recently announced an agreement to lease 16 Ku-band transponders from SES Americom. The five Ka-band satellites for which Rainbow DBS has received authorizations are to be located at 62° W.L., 71° W.L., 77° W.L., 119° W.L., and 129° W.L. See *Public Notice*, Policy Branch Information, Report No. SAT 00179, November 26, 2003, and *Public Notice*, Policy Branch Information, DA No. 04-18, Report No. SAT-00184, January 7, 2004. These Ka-band channels could be used to provide data or video services or both. However, it usually takes a number of years to construct and launch satellites after they have been licensed. Rainbow DBS's agreement with SES Americom is for Rainbow VOOOM to lease 16 transponders over the next ten years on the AMC-6 hybrid C/Ku-band satellite, beginning on October 1, 2004. See "SES AMERICOM Enters Into Lease Agreement With Rainbow DBS, AMERICOM2Home's Second Anchor Customer; Agreement Expands VOOOM's High Definition Capacity," News Release, June 9, 2004. <www.ses-americom.com/media/2004/06_09_04.html> viewed on September 28, 2004. However, DBS satellites and DBS customer satellite dishes operate on frequencies that are not exactly the same as the Ku-band frequencies.

⁷² In fact, the licenses for these channels have not yet been granted. Following auctions, winning bidders are required to submit "long-form" applications demonstrating their qualifications to hold the licenses they have won. The long-form applications filed by the winning bidders in Auction No. 52 are currently pending. See Application of Rainbow DBS Company L.L.C. for Authority to Construct, Launch and Operate a Direct Broadcast Satellite in the 12.2-12.7 GHz and 17.3-17.8 GHz Frequency Bands at the 175 degree orbital location, File No. SAT-LOA-20040917-00183 (filed September 17, 2004); Application of Rainbow DBS Company L.L.C. for Authority to (continued....)

26. The restriction we adopt today, although we view it as a special approach for a specific set of circumstances, is also consistent with past Commission policies to promote competition. In 1995, the Commission adopted an eligibility restriction for the DBS service. Under that restriction, parties that already held an attributable interest in full-CONUS channels were not allowed to permanently acquire at auction the construction permit for the 28 channels available at the 110° W.L. orbit location. If such a party won that permit, it was required to divest its full-CONUS channels at other locations within twelve months.⁷³ In adopting this restriction, the Commission found that the public interest would be best served by encouraging the entry of a new full-CONUS DBS provider with a robust channel capacity and the incentive to compete fully with full-CONUS DBS operators at other orbit locations.⁷⁴ The restriction was upheld by the U.S. Court of Appeals for the D.C. Circuit, which agreed with the Commission's decision that the auction rule "was reasonably aimed at promoting [] competition by fostering the development of a third independent and competitive provider of DBS service and preventing the concentration of all the full-CONUS channels in only two firms."⁷⁵

27. We recognize that, as EchoStar points out, the Commission in 1999 allowed EchoStar to acquire the license for 28 DBS channels at the 110° W.L. orbit location, finding that the limitation imposed on that license in 1995 should no longer be applied.⁷⁶ We also take into consideration the fact

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Construct, Launch and Operate a Direct Broadcast Satellite in the 12.2-12.7 GHz and 17.3-17.8 GHz Frequency Bands at the 166 degree orbital location, File No. SAT-LOA-20040917-00182 (filed September 17, 2004); Application of EchoStar Satellite L.L.C. for Authority to Construct, Launch and Operate a Direct Broadcast Satellite in the 12.2-12.7 GHz and 17.3-17.8 GHz Frequency Bands at the 157 degree orbital location, File No. SAT-LOA-20040917-00184 (filed September 17, 2004). Moreover, even after licenses are granted for satellite systems, the licensees still need to construct and launch the satellites, which usually takes a number of years.

In the 2002 *EchoStar/DirecTV Hearing Designation Order*, the Commission concluded that none of the potential entrants utilizing satellite-based technologies were likely to be able to enter the domestic retail MVPD market to achieve a significant market impact within two years. The Commission also stated that it was not able to include Rainbow DBS in the category of potential entrants for purposes of its competitive analysis. The Commission stated that even if Rainbow DBS launched its satellite on schedule, it would be highly unlikely that the operator could roll out its new service and acquire a significant customer base sufficient to offset the likely competitive harms of the proposed EchoStar/DirecTV merger within two years. *EchoStar/DirecTV Hearing Designation Order*, 17 FCC Rcd at 20617, ¶ 143. This finding in 2002 does not negate our analysis here. At the time of the *EchoStar/DirecTV Hearing Designation Order*, Rainbow DBS had not yet gone into operation, but since that time it has commenced service. (As we noted above, since the EchoStar/DIRECTV merger review, Rainbow DBS has successfully launched its Rainbow 1 satellite and has begun providing its VOOM service.) In any case, our decision here is not premised on an assumption that a particular service provider, Rainbow DBS, will necessarily acquire the 61.5° W.L. license, nor is it intended to guarantee such a result. Moreover, our analysis of likely market changes within a two-year timeframe of the issuance of the *EchoStar/DIRECTV Hearing Designation Order* in 2002 does not undermine our conclusion that it would be in the public interest to promote the development of an additional DBS provider by restricting eligibility for the 61.5° W.L. license.

⁷³ *DBS R&O*, 11 FCC Rcd at 9723, ¶ 28.

⁷⁴ *Id.* at 9736, ¶ 62.

⁷⁵ *DirecTV v. FCC*, 110 F.3d 816, 831 (D.C. Cir. 1997).

⁷⁶ The Commission found that, although allowing EchoStar to acquire the authorization would make it unlikely that another firm with the intent of competing with cable operators would enter the U.S. DBS industry, the potential competitive benefits of allowing EchoStar to become a stronger competitor in MVPD markets outweighed the potential competitive costs of reduced entry into the DBS industry. The Commission found that these potential (continued....)

that the DBS landscape has changed since the 1996 DBS auctions and the 1999 decision. In particular, although it is clear that DBS offers a somewhat different mix of programs and other services than any individual cable company, DBS now competes to a greater extent with cable than it did in the past.⁷⁷ Nevertheless, because of the unique circumstances here, particularly the lack of any other DBS channels located at an orbit position that can serve the eastern United States, we find that it is in the public interest to restrict eligibility for the license for the two remaining channels at 61.5° W.L. We find, as the Commission did in 1995, that we are presented with circumstances that may be conducive to promoting competition by fostering the development of an additional independent DBS provider. Although the 61.5° W.L. orbit location is not itself defined by the Commission as a full-CONUS location, we find that limiting eligibility for these channels will increase the likelihood of an additional supplier of DBS services that could potentially develop a nationwide service using these and possibly other channels at other locations. We also believe that, even if the 61.5° W.L. channels are ultimately used to provide a specialized or niche service that becomes a complement to other DBS services, rather than as part of a service that duplicates all the programming of other service providers, such use will be in the public interest. We are not persuaded that EchoStar's speculation that no entities besides itself and Rainbow DBS will be interested in these channels is a sufficient reason for us to forego what we consider to be a unique opportunity to promote such increased choices for consumers. Further, we conclude that even though DBS provides a competitive alternative to cable, that does not diminish the public's interest in increased competition among providers of DBS service.

28. We note too that although our decision here is based on unique circumstances, and we do not consider it to constitute a precedent for other situations as EchoStar contends it will be, we find that it is in keeping with other past Commission decisions to adopt a license eligibility restriction in order to promote competition.⁷⁸ Moreover, by limiting this eligibility restriction to a period of four years, we adopt a minimally intrusive regulation that is consistent with previous eligibility restrictions that expired after serving their purpose.

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competitive costs were mitigated by other entry possibilities, such as the potential entry of utilities in MVPD markets. In re Application of MCI Telecommunications Corporation, Assignor, and EchoStar 110° Corporation, Assignee, For Consent to Assignment of Authorization to Construct, Launch, and Operate a Direct Broadcast Satellite System Using 28 Frequency Channels at the 110° W.L. Orbital Location, *Order and Authorization*, 16 FCC Rcd 21608, 21618-19, ¶ 21 (1999). However, as noted above, in our recent Annual Report on Competition in the Video Programming Market, we found that although DBS continues to provide a somewhat differentiated product from cable, nevertheless DBS has increasingly become a stronger competitor to cable and currently accounts for over 21 percent of the subscribers to MVPD services. *Tenth Annual Report*, 19 FCC Rcd at 1718-19, Table B-1. Thus, we believe that the public interest may now best be served by providing opportunities for additional DBS service providers, and that it is less important to provide opportunities for the two major incumbent DBS providers to become even stronger competitors to cable TV systems. Further, EchoStar has now become a strong competitor, and we do not believe its ability to compete in either the DBS or larger MVPD market will be affected by its not acquiring the 61.5° W.L. license. See also EchoStar Comments at 9.

⁷⁷ In *DirecTV v. FCC*, the Court, in reaching its conclusion that the restriction on full-CONUS licensees was reasonable, took into account that the Commission had found that DBS operators did not compete directly with other MVPDs. *DirecTV v. FCC*, 110 F.3d at 831.

⁷⁸ The Commission's original cellular rules, for example, limited ownership of A block licenses to non-wireline carriers and of B block licenses to wireline carriers through the initial filing period. These limitations were intended to give both wireline and non-wireline carriers an opportunity to provide cellular service. See Amendment of the Commission's Rules for Rural Cellular Service, *Order on Reconsideration of Second Report and Order*, 4 FCC Rcd 5377, ¶¶ 22-25 (1989).

29. In addition to the public policy reasons we have for the eligibility restriction on DBS providers we adopt here, we note that this restriction is also consistent with the goals of the Communications Act. Section 309(j)(3)(B) of the Act requires the Commission, in specifying eligibility for licenses to be auctioned, to seek to promote "economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants...."⁷⁹ Although in many circumstances open eligibility tends to further the objectives of Section 309(j)(3)(B), we believe that in the particular circumstances present here the eligibility restriction we adopt today will better promote these statutory goals by providing entities other than the two major DBS operators with an opportunity to develop a more robust service and to bring the benefits of greater competition to American consumers.

30. With respect to our decision to adopt an eligibility restriction with a term of four years, we note that, as discussed below, DBS licensees are currently required not only to complete contracting for the construction of their satellites within one year of grant of authorization of the satellite, but also to complete construction of their first satellite within four years of authorization and to put into operation all of their satellites within six years of authorization.⁸⁰ In light of these milestone requirements, we believe that it is reasonable to specify four years as the period during which we will not allow any entity operating at DBS orbit locations capable of serving the 50 states to acquire the 61.5° W.L. license.

31. As we have explained, the purpose of the eligibility restriction we adopt today is to promote the development of an additional DBS provider. Thus, we wish to assign the 61.5° W.L. license to an entity that will use the license to provide DBS service, and not to an entity that will resell the license to a previously ineligible party soon after acquiring it. We believe that the best way to ensure that entities do not acquire the license with the intention of reselling it to a previously ineligible party is to prohibit such resale before the construction of the first satellite authorized under the license is completed. Thus, we will require compliance with the four-year milestone before the 61.5° W.L. license may be transferred to a company that is operating at orbit locations capable of providing DBS service to the 50 states. At the same time, we recognize that the auction winner might face circumstances outside its control so that it might become appropriate or necessary for it to resell the license at some point. Therefore, we do not want to extend the eligibility restriction on the license for an unreasonable period of time, or to make it permanent. Considering all these factors, we find that four years represents an appropriate period of time for the restrictions we adopt today.

32. In reaching these conclusions, we find that we need not resolve all of the issues raised by EchoStar and Rainbow DBS in their pleadings. As noted above, for example, Rainbow DBS claims that EchoStar and DirecTV have an enormous incentive to acquire the license at 61.5° W.L. to forestall competition,⁸¹ and that they will not put the channels to their optimal use.⁸² In his affidavit filed on behalf of Rainbow DBS, Professor Joseph Farrell argues that a firm with significant market power may have a substantial incentive to acquire an asset in order to prevent it from falling into the hands of a competitive rival and that, based upon the current share of DBS channel assignments to DirecTV,

⁷⁹ 47 U.S.C. § 309(j)(3)(B).

⁸⁰ See *infra* paragraph 50.

⁸¹ Rainbow DBS Comments at 8.

⁸² *Id.* at 12-13.

EchoStar, and Rainbow DBS, EchoStar and DirecTV will have much greater incentives to forestall increases in DBS competition than would Rainbow DBS.⁸³ EchoStar disputes these assertions regarding its market power, its incentives to act anticompetitively, and its use of the 61.5° W.L. channels.⁸⁴ EchoStar also suggests that ownership of Rainbow DBS by Cablevision presents a greater competitive threat than does purchase of the 61.5° W.L. license by EchoStar, particularly because, according to EchoStar, the relevant market is likely to be the broader MVPD product market rather than the narrower DBS product market.⁸⁵

33. We need not resolve these disputes here. It is unnecessary for us to evaluate precisely the possible reasons why EchoStar or DirecTV might choose to acquire the license for the two channels at 61.5° W.L., or to determine whether these reasons might be anticompetitive or pro-competitive or both. We recognize that EchoStar and DirecTV may have a variety of business reasons to acquire the two channels at 61.5 W.L. On the one hand, their acquisition of the 61.5° W.L license might enable them to expand their service offerings. On the other hand, such acquisition would prevent another DBS provider from using the last two available channels that serve all of the eastern United States to compete against the other large DBS companies. In any case, we find that by limiting eligibility for these channels so that any entity other than firms operating satellites at orbit locations capable of serving the 50 states will be eligible, we will increase the possibility that an additional provider of DBS services might develop. Given the significant potential benefits of having an additional DBS provider, and the small potential harms to the two incumbent nationwide DBS providers caused by this policy,⁸⁶ this is a sufficient reason for imposing the eligibility restriction we adopt today.

34. In light of our finding that an eligibility restriction for the 61.5° W.L. license on entities currently operating satellites at orbit locations capable of providing DBS service to the 50 U.S. states is in the public interest, we conclude that it is unnecessary for us to determine whether there would be "a significant likelihood of substantial harm to competition" if we imposed no eligibility restrictions on the license.⁸⁷ Rainbow DBS argues that eligibility restrictions against EchoStar and DirecTV are necessary to avoid substantial harm to competition and consumer welfare.⁸⁸ However, because we find that the unique circumstances of the 61.5° W.L. license provide us with an opportunity to encourage the

⁸³ Farrell Affidavit at 2, 6-7.

⁸⁴ EchoStar Reply Comments at 1, 2, 5-7.

⁸⁵ *Id.* at ii, iii.

⁸⁶ We note that in our decision adopting rules for the Multichannel Video Distribution and Data Service ("MVDDS"), we allowed all DBS providers to acquire MVDDS licenses. See *MVDDS Second Report and Order*, 17 FCC Rcd at 9677-82, ¶¶ 159-70. Thus, although we limit the eligibility of a class of DBS licensees for the two channels at the 61.5° W.L. orbit location, we have not limited the eligibility of any DBS licensees for MVDDS licenses. We note also that affiliates of current DBS operators, specifically EchoStar and Rainbow DBS, have ownership interests in entities that won MVDDS licenses in Auction No. 53, which closed on January 27, 2004. See *Public Notice*, Multichannel Video Distribution and Data Service Spectrum Auction Closes; Winning Bidders Announced, Report No. AUC-04-53-G, 19 FCC Rcd 1834 (2004); FCC Form 175, Application to Participate in an FCC Auction, of South.Com, submitted on November 12, 2003; FCC Form 175, Application to Participate in an FCC Auction, of DTV Norwich, LLC, submitted on November 12, 2003, as amended on January 13, 2004.

⁸⁷ See *Auction No. 52 Comment Public Notice*, 18 FCC Rcd at 3480-81.

⁸⁸ Rainbow DBS Comments at 12-14.

development of an additional provider of DBS service, and that such development would be in the public interest, we conclude that we need not perform the analysis necessary to reach a determination concerning the possibility of a significant likelihood of substantial harm to competition. Thus, we do not apply the "competitive harm" standard in this case.

35. We also decline to adopt all of Rainbow DBS's proposed eligibility restrictions for the available license at 61.5° W.L. If the Commission were to agree to all of these proposed restrictions, the only company that would be eligible for this license would be Rainbow DBS. We do not believe it would be in the public interest to structure eligibility for a DBS license in such a manner that only a single company would be eligible to obtain the license. In particular, we do not find that it is necessary or appropriate to limit eligibility to a facilities-based entrant that already has an authorization to use spectrum at 61.5° W.L. We can not accurately predict what firms other than Rainbow DBS might choose to use these channels. It is possible that another entity would have an interest in these two DBS channels, and might wish to use them along with other DBS channels at other orbit locations or in combination with Fixed Satellite Service channels or other frequencies. Therefore, we see no reason to limit eligibility to that extent. We note also that we have a long history of encouraging competition among multiple applicants and licensees,⁸⁹ and it is rare for the Commission to restrict eligibility for spectrum licenses to facilities-based incumbents.

36. We do adopt certain of the proposals Rainbow DBS makes in its ex parte filing of March 22, 2004, but we decline to adopt all of them.⁹⁰ In this specific situation involving the last two available channels at 61.5° W.L., we are prohibiting any firms that are operating satellites at orbit locations capable of providing DBS service to the 50 U.S. states from acquiring, owning or controlling the license for a period of four years. Because it would frustrate the purposes of this rule if entities that were prohibited from acquiring the license for four years were able immediately to lease the subject channels and then use them to provide program services to their subscribers, we will not allow such ineligible firms to lease the channels during the four-year period during which the eligibility rules apply. We stress that we are applying this restriction on transponder or channel leasing only in these particular circumstances, and do not intend this action to be seen as a precedent that would apply to other satellite leasing arrangements involving DBS systems in general or other non-DBS satellite systems.⁹¹

37. We believe, particularly in light of our decision to prohibit leasing arrangements with entities barred from acquiring the 61.5° W.L. license, that the 5 percent attribution standard Rainbow DBS proposes is unnecessarily restrictive. Rainbow DBS argues that the Commission should adopt this attribution limit as it did in 1995 for the auction of the 110° W.L. construction permit.⁹² We note,

⁸⁹ As we recently stated, "[t]he Commission has a long-standing policy of promoting competition in the delivery of spectrum-based communications services and has implemented numerous measures to foster entry and ensure the availability of competitive choices in the provision of such services." *EchoStar-DirecTV Hearing Designation Order*, 17 FCC Rcd at 20598, ¶ 88. Specifically, we cited our policies to encourage competition in the provision of DARS, PCS, and the initial DBS auctions. *Id.* at 20598-20600, ¶¶ 88-90.

⁹⁰ *Rainbow DBS March 22 Ex Parte*.

⁹¹ This is consistent with the *Part 100 R&O*. In that proceeding, the Commission invited comment on adopting a general limit or restriction on DBS transponder or channel leases, but later rejected that proposal because there was no basis for concluding that such a rigid restriction was warranted. Instead, the Commission stated that it would review specific allegations of situations in which leasing might lead to a *de facto* transfer of control. *Part 100 R&O*, 17 FCC Rcd at 11397, ¶ 141.

⁹² *Rainbow DBS March 22 Ex Parte* at 1.

however, that, unlike the restriction we adopt today, the Commission's 1995 eligibility restriction did not include a prohibition against leasing agreements. An entity that was ineligible to acquire the 110° W.L. construction permit could therefore have entered into a leasing arrangement with the company that acquired the permit and thereby used the subject channels for its own service. If an ineligible entity had been permitted to have more than a 5 percent interest in the company that acquired the 110° W.L. construction permit, the ineligible entity might have been able to influence that company to enter into a leasing agreement with it. Under the rules we adopt today, however, even the ownership of a substantial minority interest in the company that acquires the 61.5° W.L. license will not enable an ineligible entity to use the subject channels for its own service.

38. Moreover, our DBS milestone requirements should act as a significant deterrent against ineligible entities acquiring a minority interest in a company in order to influence that company to acquire the 61.5° W.L. license with the aim of transferring the license to the ineligible entity after the expiration of our eligibility restriction. As noted above, under our milestone rules the company that acquires the 61.5° W.L. license will have to complete construction of at least one satellite prior to the expiration of our eligibility restriction.⁹³ We do not believe that a company would incur the very substantial cost of constructing a satellite solely in order to acquire a license to operate on two channels. While it is conceivable that a company would have done so in order to acquire the 28 channels on which the 110° W.L. construction permit authorized operations, it is not plausible that a company would do so for the use of two channels.

39. Accordingly, we will prohibit DBS operators currently capable of serving the 50 states only from having a controlling interest in an entity that acquires the 61.5° W.L. license. Those that will be considered to have a controlling interest will be individuals and entities with either *de jure* or *de facto* control of an applicant for this license. *De jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. *De facto* control is determined on a case-by-case basis. Further, for purposes of this prohibition we will apply the definitions of "controlling interests" and "affiliate" currently set forth in Sections 1.2110(c)(2) and 1.2110(c)(5) of the Commission's rules, which define controlling interests and affiliates for the purpose of determining auction applicants' eligibility for small business provisions.⁹⁴ These provisions have been developed over a number of years and have worked well to identify individuals and entities that have the ability to control applicants for Commission licenses. We therefore find that these provisions are well suited to our goal here of ensuring that a party other than a DBS operator currently serving the 50 states is able to acquire or control the 61.5° W.L. license.⁹⁵

40. We note that Section 1.2110(c)(2) includes the requirement that ownership interests

⁹³ See also *infra* paragraph 50. DBS operators that receive new or additional DBS authorizations after January 1996 must, *inter alia*, complete contracting for construction of their satellites within one year of grant of the authorization, 47 C.F.R. § 25.148(b)(1), and must complete construction of the first satellite in their DBS systems within four years of grant of the authorization. 47 C.F.R. § 25.148(b)(2).

⁹⁴ 47 C.F.R. §§ 1.2110(c)(2) & (5).

⁹⁵ Our decision here is distinguishable from our application of different attribution thresholds in other contexts. Our decision here is based specifically on the factors discussed above, i.e., our prohibition of leasing agreements with ineligible entities and our belief that our milestone requirements will deter ineligible entities from seeking a minority interest in a company in order to acquire the two 61.5° W.L. channels after the expiration of our eligibility restriction.

generally be calculated on a fully diluted basis,⁹⁶ and also provides that any person who manages the operations of an applicant pursuant to a management agreement, or enters into a joint marketing agreement with an applicant, shall be considered to have a controlling interest in the applicant if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, the types of services offered, or the terms or prices of such services.⁹⁷ These provisions are consistent with certain of Rainbow DBS's proposals, and we find that, together with the other provisions of Section 1.2110(c)(2) and Section 1.2110(c)(5), they will be sufficient to ensure that a party other than a DBS operator currently serving the 50 states has control of the 61.5° W.L. license during the period during which our eligibility restriction is in force.

41. Finally, we decline to adopt Rainbow DBS's proposal that we require applicants for the 61.5° W.L. license to certify their compliance with our eligibility rules at the time they submit their FCC Form 175 for the auction.⁹⁸ All auction applicants are required to certify on their FCC Form 175 that they are, among other things, legally qualified pursuant to Section 308(b) of the Communications Act.⁹⁹

By making this certification, auction applicants will be certifying that they are in compliance with the eligibility rule we adopt today. Moreover, the eligibility restriction we adopt does not provide for a post-auction opportunity to come into compliance with the rule, as did the rule the Commission adopted with respect to full-CONUS licenses in 1995, but rather remains in force for a period of four years after the grant of the initial license. Under these circumstances, we find it unnecessary to adopt the special certification requirement Rainbow DBS proposes.

B. Cable/DBS Cross-ownership

42. With respect to the issue of prohibiting terrestrial providers of multichannel video distribution services from acquiring the 61.5° W.L. license, Rainbow DBS asserts that in 1995 the Commission correctly determined that limiting cable participation in the DBS service would not promote competition, that there were no meaningful risks from cable's entry into the DBS marketplace, and that there were benefits to be realized from such participation. Rainbow DBS further argues that this reasoning remains sound today and that the arguments against a cable/DBS cross-ownership restriction are even stronger now because the two major DBS providers restrain any potential exercise of market power by cable operators.¹⁰⁰ EchoStar asserts that the acquisition of the 61.5° W.L. license by Rainbow DBS would pose a greater competitive risk than its own acquisition of the license in light of

⁹⁶ 47 C.F.R. §§ 1.2110(c)(2)(ii)(A)(1).

⁹⁷ 47 C.F.R. §§ 1.2105(c)(2)(ii)(H) & (I).

⁹⁸ *Rainbow DBS March 22 Ex Parte* at 2.

⁹⁹ 47 C.F.R. § 1.2105(a)(2)(v).

¹⁰⁰ Rainbow DBS Comments at 17-19. We note that Rainbow DBS acknowledges that it is an indirect wholly owned subsidiary of Cablevision. Rainbow DBS Comments at 1. Since Rainbow DBS filed its comments in this proceeding, Cablevision has announced that it plans to divest itself of Rainbow DBS. See Cablevision Board of Directors Approves Plan to Pursue Spin Off Of Satellite Service and Clearview Cinemas, News Release, June 2, 2003 at <http://www.cablevision.com/index.jhtml?id=2003_06_02>. More recently, James Dolan, the CEO of Cablevision, stated that the planned spin-off of its Rainbow Media Entertainment Inc. division, which includes Rainbow DBS as well as three national programming networks and other assets, would be delayed but should still happen sometime early in the fourth quarter of 2004. See Mike Farrell, "Rainbow DBS Spinoff Bumped to 4Q," Multichannel News, September 28, 2004.

Rainbow DBS's status as a cable operator that has undeniable market power in its franchise area,¹⁰¹ but it concedes that the risk of Rainbow DBS acquiring the license for the two unassigned channels at 61.5° W.L. is "not grave enough" to justify barring Rainbow DBS from doing so.¹⁰²

43. In the *Part 100 R&O*, we declined to adopt any rules prohibiting cable/DBS cross-ownership, but instead indicated that we would deal with any potential competitive problems on a case-by-case basis.¹⁰³ As we explain below, at this time we see no reason to review that decision. At this time there are no specific rules prohibiting a cable entity from acquiring DBS licenses. Nevertheless, the Commission has the authority to address these issues on a case-by-case basis and retains the flexibility to take appropriate action under the circumstances at the time. In addition, the Commission has authority to approve, reject, or condition the assignment or transfer of DBS channels to other entities.¹⁰⁴ For example, the Commission has examined the issue of cross-ownership in the context of specific transfer application reviews.¹⁰⁵

44. We recognize that there may be a tension between, on the one hand, our goal of promoting an additional DBS provider as a competitor both to other DBS systems and to cable systems, and, on the other hand, our finding that it is not necessary to restrict the eligibility of cable operators to acquire the license for the two channels at 61.5° W.L. We also recognize that cable operators whose subscribers make up at least 35 percent of the MVPD households in MVDDS license areas are currently prohibited from obtaining an attributable interest in an MVDDS license for such areas.¹⁰⁶ In adopting this restriction in the *MVDDS Second Report and Order*, the Commission carefully balanced the pros and cons of prohibiting cable operators from acquiring MVDDS licenses. The Commission acknowledged, for example, that allowing the acquisition of MVDDS licenses by in-region cable operators would be efficient and pro-competitive, permitting them to use MVDDS to serve customers they are currently unable to serve economically in their franchise areas and expand into the territories of other cable operators. The Commission also indicated that a cable restriction might deny operators the opportunity to provide efficiently non-cable services, such as broadband video and data services, and could have the effect of excluding incumbent companies that are developing innovative technologies for the band.¹⁰⁷ Nevertheless, the Commission found that open eligibility for in-region cable operators poses a significant likelihood of substantial competitive harm because, with their large market shares, cable

¹⁰¹ EchoStar Reply Comments at ii.

¹⁰² *Id.*

¹⁰³ See *Part 100 R&O*, 17 FCC Rcd at 11396, ¶ 140.

¹⁰⁴ 47 U.S.C. § 310(d).

¹⁰⁵ See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc., and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd 6547, 6645-49, ¶¶ 241-51 (2001). The Commission and the Department of Justice each have independent authority to examine communications mergers. We also note that in May 1998 the Antitrust Division filed an antitrust suit to prevent PrimeStar, Inc. (a company providing medium power satellite video services and owned by five of the largest cable MSOs), from acquiring the DBS assets of News Corp and MCI.

¹⁰⁶ See *MVDDS Second Report and Order*, 17 FCC Rcd at 9679-81, ¶¶ 164-70. See also 47 C.F.R. § 101.1412.

¹⁰⁷ *MVDDS Second Report and Order*, 17 FCC Rcd at 9678-79, ¶¶ 161-62.

operators have a strong incentive to prevent entry by new MVPD providers. In making this determination, the Commission gave considerable weight to the fact that MVPD markets are "characterized by a limited number of current providers and a small likelihood of increased competition."¹⁰⁸

45. At the same time, it is important to note that, in the *MVDDS Second Report and Order*, the Commission was very careful to restrict the eligibility of cable operators only where there is a "significant overlap" of an operator's service area and an MVDDS license area. Recognizing that cable operators' service areas will typically be smaller than MVDDS license areas,¹⁰⁹ that cable operators will sometimes be partly in-region and partly out-of-region, and that, even if entirely in-region, their service areas may cover only a limited part of an MVDDS license area, the Commission adopted a definition of "significant overlap" intended to identify only those cable operators whose overlap would create a strong incentive for them to acquire MVDDS licenses for the purpose of foreclosing entry and protecting current market position.¹¹⁰

46. In contrast to MVDDS licenses, DBS licenses authorize the provision of service to as much of the nation in as many local geographic markets as is technically feasible from a given orbit location, rather than to discrete geographic areas within the country. Thus, a different analysis is necessary in this case than that for MVDDS licenses. Whereas cable operators may have incentives to block potential competition from an entrant using MVDDS within overlapping local markets, the incentives to block competition from a DBS license that offers limited service to many local markets, some of which are served by the cable operator and some of which are not, are less clear. Regardless of the incentives for cable operators, the possible outcomes of cable operator acquisition of the licenses do not run counter to our objectives. If a cable operator without an existing DBS service acquires the licenses, it will be forced by our benchmark requirements to launch a service using the two available channels. Such a service would probably not provide as much benefit to consumers as a stronger additional DBS competitor, but it would provide a new service to consumers, including potentially wider distribution of high-definition digital programming. A cable operator offering such a service would likely configure it to be a complement to the services it offers within its own service areas, and the service would likely be a complement to cable and DBS services in all local areas.

47. If, on the other hand, Rainbow DBS, an existing DBS service provider operated by Cablevision, acquires the licenses, this will strengthen its existing DBS service, at least marginally, or perhaps to an even greater extent. The additional channels may improve Rainbow DBS's ability to operate as an additional DBS competitor. As mentioned above, EchoStar has suggested that cable ownership of a DBS system might raise competitive questions. At this time, however, we do not have any evidence to suggest that if Rainbow DBS were to acquire the additional channels, it would do

¹⁰⁸ *Id.* at 9679, ¶ 164.

¹⁰⁹ In the *MVDDS Third Report and Order*, the Commission decided to base MVDDS service areas on Nielsen Media Research's Designated Market Areas, rather than the U.S. Department of Commerce's Component Economic Areas originally adopted. Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates, and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band, *Third Report and Order*, 18 FCC Rcd 13468, 13471-74, ¶¶ 8-13.

¹¹⁰ *MVDDS Second Report and Order*, 17 FCC Rcd at 9680-81, ¶¶ 165-168.

anything other than use those channels to expand its permanent group of DBS offerings. Thus, regardless of whether Rainbow DBS or some other entity owned by or affiliated with a cable company were to acquire the 61.5° W.L. license, or whether Cablevision divests itself of Rainbow DBS,¹¹¹ cable acquisition of the licenses would be at least somewhat positive for consumers, and may be important for an additional DBS competitor. As a result, we do not anticipate any significant competitive problems from cable system ownership of the 61.5° W.L. license, and therefore do not think it would be appropriate or necessary to restrict cable operators from acquiring this license.

C. Other Issues

48. *Section 309(j)*. Both EchoStar and Rainbow DBS present arguments with respect to the application of Section 309(j)(6)(E).¹¹² It is well established that the Commission is obligated under this provision to avoid mutual exclusivity only where it finds that it is in the public interest to do so.¹¹³ For the reasons stated above, we find that it is not in the public interest to avoid mutual exclusivity entirely with respect to the 61.5° W.L. license and therefore Section 309(j)(6)(E) does not require us to do so. Rainbow DBS argues that Section 309(j)(3) requires the Commission to establish eligibility criteria that promote the development and rapid deployment of new technologies, products, and services; economic opportunity and competition through the avoidance of excessive concentration of licenses; and the efficient and intensive use of the electromagnetic spectrum. According to Rainbow DBS, these directives require the Commission to exclude incumbents with authorizations for full-CONUS orbit slots from bidding on the two remaining channels at 61.5° W.L.¹¹⁴ We do not agree that Section 309(j)(3), which authorizes but does not require us to establish eligibility requirements for licenses, mandates the result requested by Rainbow DBS. We find that the eligibility restriction we adopt today is in the public interest because it better promotes the objectives of Section 309(j)(3), including the development and rapid deployment of new services; economic opportunity and competition by avoiding excessive concentration of licenses; and the efficient and intensive use of the spectrum. Finally, because we do not adopt all of Rainbow DBS's proposed eligibility restrictions, and do not preclude any entities other than those operating at orbit locations capable of serving the 50 states from participating in

¹¹¹ See *supra* note 100.

¹¹² 47 U.S.C. § 309(j)(6)(E). See also EchoStar Comments at 5; EchoStar Reply Comments at 12; Rainbow DBS Comments at 6; Rainbow DBS Reply Comments at 6-7.

¹¹³ See, e.g., Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of The American Mobile Telecommunications Association, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 22709, 22719-23, ¶¶ 20-27 (2000). See also *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000), *petition for rehearing denied* (Oct. 25, 2000); *DirecTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997).

¹¹⁴ Rainbow DBS Comments at 3, 6-7, citing 47 U.S.C. §§ 309(j)(3)(A), (B), & (D). These sections require the Commission, in identifying classes of licenses to be auctioned, specifying eligibility and other characteristics of such licenses, and designing auction methodologies, to "seek to promote" the following objectives: "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays" (47 U.S.C. § 309(j)(3)(A)); "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women" (47 U.S.C. § 309(j)(3)(B)); and "efficient and intensive use of the electromagnetic spectrum" (47 U.S.C. § 309(j)(3)(D)).

the auction of the 61.5° W.L. license, we need not address EchoStar's argument that these restrictions would run afoul of Section 309(j)(3)(C).¹¹⁵

49. *Dominion Video Satellite, Inc.* As noted above, Rainbow DBS argues that any eligibility restrictions applicable to EchoStar with respect to the available frequencies at 61.5° W.L. must also be applied to Dominion.¹¹⁶ Rainbow DBS states that because Dominion is under a contractual obligation to allow EchoStar to use its frequencies at the eastern orbit location, it "would be required to turn them over to EchoStar."¹¹⁷ We have no evidence before us to suggest that Dominion would be required to turn over the 61.5° W.L. channels to EchoStar if it were to win the license for them. Although Dominion is leasing channels from EchoStar, no facts have been presented that would persuade us that this lease arrangement requires Dominion to enter a lease agreement with EchoStar with respect to channels it may acquire in the future, or that for any other reason the companies' current lease arrangement alone should disqualify Dominion from acquiring the license for the 61.5° W.L. channels.¹¹⁸ As we indicated in the *Part 100 R&O*, we will review specific allegations that leasing has led to a *de facto* transfer of control on a case-by-case basis.¹¹⁹

50. *Due Diligence Milestones.* In its comments, Rainbow DBS points out that the Commission's rules require DBS licensees to meet due diligence milestones in the construction and launch of DBS satellites. However, Rainbow suggests that the Commission should consider imposing even stricter timelines with respect to the two channels at 61.5° W.L. in order to ensure speedy delivery of services and prevent warehousing of spectrum.¹²⁰ In the *Part 100 R&O*, the Commission clarified its due diligence policy for DBS satellites.¹²¹ This policy includes several requirements, including that DBS operators must have completed contracting for construction of all newly authorized satellites within one year of the grant of the authorization,¹²² and that the satellites must be constructed and in

¹¹⁵ EchoStar Comments at 4. Section 309(j)(3)(C) requires the Commission, in identifying classes of licenses to be auctioned, specifying eligibility and other characteristics of such licenses, and designing auction methodologies, to seek to promote the objective of "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource." 47 U.S.C. § 309(j)(3)(C).

¹¹⁶ See *supra* paragraph 9.

¹¹⁷ Rainbow DBS Reply Comments at 7, 8.

¹¹⁸ Dominion leases eight transponders on EchoStar III. Concurrent with the Dominion lease, EchoStar subleases six of the transponders back from Dominion, subject to the control of Dominion as the licensee.

¹¹⁹ In the *Part 100 R&O*, we examined the issue of whether we should amend our due diligence rules to allow DBS licensees to satisfy their due diligence obligations through the lease or purchase of transponder space on a satellite that is owned by another licensee. We declined to amend our rule and concluded that it was more appropriate to address questions regarding leases or the purchase of transponder capacity on a case-by-case basis. *Part 100 R&O*, 17 FCC Rcd at 11354, ¶ 45. We also stated that we would review specific allegations of situations in which leasing might lead to a *de facto* transfer of control. *Id.* at ¶ 141.

¹²⁰ Rainbow DBS Comments at 16. See also EchoStar Comments at 6.

¹²¹ *Part 100 R&O*, 17 FCC Rcd at 11332, ¶ 2.

¹²² 47 C.F.R. § 25.148(b)(1).

operation within six years of the grant of the authorization.¹²³ Moreover, for those entities that receive new or additional DBS authorizations after January 1996, construction of the first satellite must be completed within four years of the grant of the authorization.¹²⁴ The Commission's DBS due diligence rules, and their associated deadlines, are designed to ensure that valuable spectrum is not warehoused, and that service is timely deployed for the benefit of the public. We require an entity receiving a DBS authorization to proceed with due diligence in implementing its authorization, unless the Commission determines otherwise after a proper showing in any particular case.¹²⁵

51. The Commission's due diligence rules are an effective means of monitoring the progress of licensees, and they enable the Commission to determine whether scarce orbit and frequency resources are adequately utilized without imposing undue burdens on licensees. Continued oversight and enforcement of the due diligence rules will ensure that licensees are committed to expediting delivery of DBS service to the public. Because we find that our milestone policy has been effective, and because our milestone requirements may not be met by leasing the channels to an entity that is ineligible to acquire them, we do not believe that it would be appropriate to further modify our milestone rules with respect to the 61.5° W.L. channels, and we decline to adopt a stricter milestone schedule as proposed by Rainbow DBS.

52. *Trafficking.* EchoStar argues that we should be vigilant against license trafficking in the case of the 61.5° W.L. license because, given that 30 of the 32 frequencies at that orbit location are already licensed, it poses a greater risk of trafficking than the other available licenses.¹²⁶ The eligibility restriction we put in place today prohibits firms operating satellites at orbit locations capable of serving the 50 states, and their wholly owned subsidiaries and entities they control, from acquiring, owning, or controlling the license for the two channels at 61.5° W.L. for a period beginning with the release date of this Order and ending four years after the award of the initial license. Thus, such entities may not acquire this license either through the auction or in the post-auction market for four years.

53. Given that the restrictions we adopt will remain in place for four years, there is no need for specific anti-trafficking rules to guard against the auction winner transferring the license to an ineligible entity during that time.¹²⁷ In addition, in placing this four-year restriction on firms operating satellites at orbit locations capable of providing DBS service to the 50 states, we conclude that it would not be appropriate to adopt a "one-time auction rule" like the rule the Commission adopted in 1995, even though our purpose here is similar. We find that, rather than adopt a rule tied to the auction, we will more effectively encourage the development of an additional DBS provider by restricting the acquisition and transferability of the 61° W.L. license for a definite period both through the auction and in the post-auction market. Moreover, we find that a divestiture requirement would be unduly complicated in light of current circumstances and is therefore no longer appropriate.

¹²³ *Id.*

¹²⁴ 47 C.F.R. § 25.148(b)(2).

¹²⁵ 47 C.F.R. § 25.148(b)(3).

¹²⁶ EchoStar Comments at 6-7.

¹²⁷ Other post-auction transfers or assignments will be subject to all applicable regulations. See, e.g., 47 C.F.R. § 1.2111(a).

IV. CONCLUSION

54. For the reasons stated above, we conclude that it will further the public interest to prohibit firms currently operating satellites at orbit locations capable of providing DBS service to the 50 U.S. states, as well as their wholly owned subsidiaries and entities they control, from acquiring, owning, or controlling the license for the two channels currently available at the 61.5° W.L. orbit location for a period beginning with the release date of this Order and ending four years after the award of the initial license. In addition, we conclude that such entities should be prohibited from leasing these channels during the same period. Because these channels are the only remaining unassigned DBS channels in the 12 GHz DBS band that could provide service to the eastern half of the continental United States, we conclude that such a restriction on eligibility to use them will serve the public interest by helping to promote the development of an additional provider of DBS services.

V. ORDERING CLAUSES

55. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), entities currently operating satellites at orbit locations capable of providing DBS service to the 50 U.S. states, their wholly owned subsidiaries, and entities they control shall be ineligible to acquire, own, or control the license for Direct Broadcast Satellite channels 23 and 24 at the 61.5° W.L. orbit location for a period beginning with the release date of this Order and ending four years after the date of the issuance of the initial license. Such entities are prohibited from leasing these two channels during the same period.

56. IT IS FURTHER ORDERED that the International Bureau, in awarding the license for Direct Broadcast Satellite channels 23 and 24 at the 61.5° W.L. orbit location, shall place upon it the condition that it may not be transferred or assigned to any entity described in the preceding clause, and this condition shall automatically expire four years after issuance of the license unless it is extended by the Commission.

APPENDIX: EX PARTE FILINGS

The following ex parte filings have been made:

Letter from Christopher R. Bjornson, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated March 10, 2003)

Letter from Christopher R. Bjornson, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated April 2, 2003)

Letter from Christopher R. Bjornson, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated April 10, 2003)

Letter from Christopher R. Bjornson, Counsel for Rainbow DBS, to Jane Mago, Federal Communications Commission (dated April 10, 2003)

Letter from Christopher R. Bjornson, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated April 24, 2003)

Letter from Howard J. Symons, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated May 6, 2003)

Letter from Howard J. Symons, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated March 15, 2003)

Letter from Christopher R. Bjornson, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated June 20, 2003)

Letter from Christopher R. Bjornson, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated June 20, 2003)

Letter from Christopher R. Bjornson, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated June 20, 2003)

Letter from Christopher R. Bjornson, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated July 16, 2003)

Letter from Benjamin J. Griffin, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated July 17, 2003)

Letter from Benjamin J. Griffin, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated July 17, 2003)

Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated July 31, 2003)

Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated August 1, 2003)

Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation, to Marlene H. Dortch,

Secretary, Federal Communications Commission (dated August 5, 2003)

Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated August 12, 2003)

Letter from Howard J. Symons, Counsel for Rainbow DBS, to Jane Mago, Federal Communications Commission (dated August 12, 2003)

Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated August 13, 2003)

Letter from David R. Goodfriend, Director, Legal and Business Affairs, EchoStar Satellite Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated August 25, 2003)

Letter from David R. Goodfriend, Director, Legal and Business Affairs, EchoStar Satellite Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated August 27, 2003)

Letter from Howard J. Symons, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 7, 2003)

Letter from Howard J. Symons, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 8, 2003)

Letter from Margaret L. Tobey, Counsel for Satellite Broadcasting and Communications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 9, 2003)

Letter from Margaret L. Tobey, Counsel for Satellite Broadcasting and Communications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 9, 2003)

Letter from Margaret L. Tobey, Counsel for Satellite Broadcasting and Communications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 9, 2003)

Letter from Howard J. Symons, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 21, 2003)

Letter from Howard J. Symons, Counsel for Rainbow DBS, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated March 22, 2004)

Letter from Rhonda M. Bolton, Counsel for EchoStar Satellite L.L.C., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 19, 2004)

Letter from Rhonda M. Bolton, Counsel for EchoStar Satellite L.L.C., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 22, 2004)

Letter from Rhonda M. Bolton, Counsel for EchoStar Satellite L.L.C., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated October 22, 2004)